No. 52955-6-II

THE COURT OF APPEALS, DIVISION II

State of Washington

ARYA HOLDINGS, INC.,
Appellant

Vs.

EASTSIDE FUNDING LLC, et al,
Respondent,

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

The Superior Court erred in failing to vacate the order of dismissal based on a settlement that was never performed.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

Should the Superior Court vacate an order of dismissal based on a settlement agreement if the settlement agreement is never performed?

STATEMENT OF THE CASE

IMPORTANT FACTS

This case started as a claim against Greg Daly who was a shareholder in the plaintiff company, Arya Holdings, Inc. The complaint alleged that Mr. Daly misappropriated company funds, using the money to buy real estate in his own name and that Eastside Funding, LLC was complicit in that activity. CP 1-24.

Mr. Daly obtained cashier's checks showing the "remitter" to be Arya Holdings, Inc. CP 3. He delivered

these checks to Eastside. CP 3. Eastside extended credit and facilitated the purchase of real property, taking title first in Eastside's own name, but ultimately transferring title into Mr. Daly's name personally, ***not*** in the name of Arya Holdings, Inc. CP 3-4.

Because Arya was not the title holder to any of the property, Mr. Daly was alone able to sell the property or otherwise dispose of it.

In the course of litigation, a settlement agreement was reached by all parties. According to the settlement, all claims against all parties were dismissed in exchange for which Arya Holdings, Inc. was to receive $45,000 from Mr. Daly a few months after the settlement agreement was reached. CP 41-42. It's a rather ordinary settlement agreement.

Mr. Daly never made the payment contemplated by the settlement and instead filed a bankruptcy which ultimately resulted in a discharge of his obligation to pay. CP 39, CP 74-76.

Eastside did not make good on the settlement and Arya Holdings Inc. has never received the benefit of the settlement bargain. Accordingly, Arya Holdings filed to have the dismissal of its claims vacated. CP 36-37.

The trial court declined to do so, and this timely appeal followed. CP 109; CP 110-12.

LAW AND ARGUMENT

STANDARD OF REVIEW

A trial court's decision on a CR 60(b) motion is reviewed for abuse of discretion. Mitchell v. Wash. St. Inst. of Pub. Policy, 153 Wn.App. 803, 821, 225 P.3d 280 (2009), *review denied*, 169 Wn.2d 1012 (2010). A trial court abuses its discretion when the decision is manifestly unreasonable or rests on untenable grounds or reasons. A court abuses its discretion when its decision rests on untenable grounds or is manifestly unreasonable. Green v. City of Wenatchee, 148 Wn.App. 351, 368, 199 P.3d 1029 (2009). Discretion also is abused when it is exercised contrary to law. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

Many, many Washington cases recite the proposition that the law favors an amicable settlement of claims when such a settlement appears to have been fairly made, and has not been secured by fraud, false representations, or overreaching. See L. J. Dowell, Inc. v. United Pacific Cas. Ins. Co., 72 P.2d 296, 191 Wash. 666 (Wash. 1937) citing to

Owens v. Norwood White Coal Co., 157 Iowa 389, 138 N.W. 483, 491; Schweikert v. John R. Davis Lumber Co., 147 Wis. 242, 133 N.W. 136; Railway Co. v. Bennett, 63 Kan. 781, 66 P. 1018. Nath v. Oregon Railroad & Navigation Co., 72 Wash. 664, 131 P. 251, 252. See also Seafirst Center Ltd. Partnershp v. Erickson, 127 Wn.2d 355, 366, 898 P.2d 299 (1995) which expressly recognizes "Washington's strong public policy of encouraging settlements."

However, no one is going to settle claims if there is no recourse when a settlement isn't paid and the agreement is breached.

Here, Arya settled its claims against all defendants expecting to receive as consideration for the settlement $45,000. It received nothing.

Of course, part of the reason Arya Holdings received nothing is that Greg Daly was supposed to make the payment and Mr. Daly's obligation to pay was discharged in bankruptcy.

However, Eastside Funding, which gave Arya nothing to settle, should not be advantaged merely because it gave no consideration for its dismissal.

As explained in Rosen v. Ascentry Technologies, Inc., 177 P.3d 765, 143 Wn.App. 364 (Wash.App. Div. 1 2008)

settlements can be of two sorts: "substitute contracts" or "executory accords."

If a *substitute contract* is made, then all a settling party has is the rights existing under the substitute contract. If, however, the settlement is an *executory accord*, then the settlement is breached when settlement contract is not peformed.

The law presumes that, absent some special showing, settlements are "executory accords." *See* Rosen v. Ascentry Technologies, Inc., 177 P.3d 765, 143 Wn.App. 364 (Wash.App. Div. 1 2008) ("A settlement agreement is presumed to be an executory accord, not a substituted contract." Citing to In Buob v. Feenaughty Mach. Co., 191 Wash. 477, 71 P.2d 559 (1937).)

The difference between this case and the Rosen case is only that in Rosen, a release was to occur after payment was made, but in both cases, the quid-pro-quo for release was a promise to pay. The fact that Arya Holdings in good faith promptly dismissed all parties pursuant to its agreement in the settlement agreement should not mean that it is not entitled to the benefit of its bargain or that the equitable remedy of recission should not apply if the settlement contract is breached.

Because the settlement agreement was not performed, Arya, as a non-breaching party, should be put back in the position it occupied prior to settling. To do otherwise is to discourage parties from settling or to make enforcement dependent on the various technicalities of drafting.

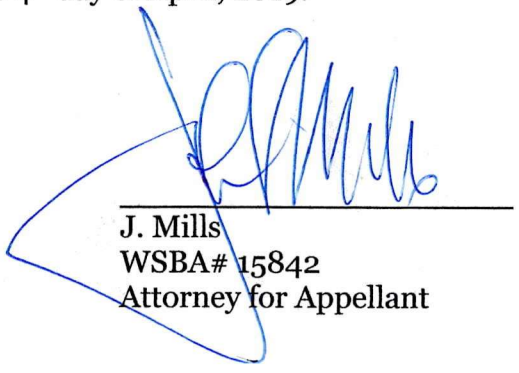
As in Rosen, what's central to this case is this: "Moreover, Rosen would not be allowed to revive his original claims if Ascentry had simply paid him under the terms of the settlement. In light of Ascentry's breach, Rosen should be allowed to pursue his original claims." It's true that the payor in Rosen was not a third party beneficiary, but similarly, to gain the benefit of the settlement, Eastside Funding simply had to make good on the $45,000 promised Arya as consideration for dismissal of its claims.

It's fundamentally unfair to enforce the dismissal part of this settlement when Arya Holdings has just ***not*** received the benefit of its bargain, and accordingly the trial court's decision is inconsistent with the principles of Rosen and should be reversed.

CONCLUSION

Settlement contracts are favored by law in Washington State. But, a settlement contract still has to be *performed* to be enforced. Because Arya Holdings never received the benefit of it's settlement bargain, it's original claims should be reinstated and the trial court abused its discretion in refusing to do so inasmuch as there is nothing in the settlement agreement suggesting that it was intended to be a substitute contract. Accordingly, the trial court's decision should be reversed with instructions to vacate the dismissal as to Eastside Funding, LLC.

DATED this 4th day of April, 2019.



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